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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

RAUL L. SARDUY

Petitioner/Appellant/Plaintiff

v.

SOUTHERN BELL TELEPHONE

Respondent/Appellee/Defendant

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The Southern Bell's brief in opposition contains, as hereinafter explained, numerous fallacies caused by Southern Bell's liberally misconstruing Sarduy's petition and other arguments of

the case. Sarduy will underline the fallacies and identify the page and paragraph where they appear (P-1, first par.). To rebut the fallacies, Sarduy will refer to the record as it was constituted before the Court of Appeals for the Eleventh Circuit and the Sarduy's Petition and Appendix therein. Because of the page limitations of a Reply Brief, only the major fallacies will be numbered and brought to issue.

1. On P-1, first par., Southern Bell stated: "Sarduy was terminated for poor performance".

If Southern Bell meant Sarduy's poor work performance in the imprecise statement, that argument was extensively disputed by Sarduy in his Response to the Motion for Summary Judgment (R3-162, pages 20 and 25-30), where he detailed, along with other related information,

his job and academic qualifications; the above normal salary increases he received for his performance; the successful completion of additional responsibilities that Sarduy was assigned by his supervisor, over and above his normal duties; and Sarduy's share in the relief of other co-workers on leave of absence.

2. On P-1, last par., Southern Bell stated "That the motion was referred by the district court to a magistrate judge. Following a hearing, the magistrate judge recommended.....". In this statement Southern Bell omitted that the magistrate conducted the hearing ignoring Sarduy's affidavit and objection (R2-76), where he reminded the magistrate that an appeal concerning Sarduy's unfinished discovery (R2-72)

was pending before the district judge (Pet. at 21-22).

3. On P-2, first par., Southern Bell stated: "....in recognition of Sarduy's claim that he had not had adequate time to pursue discovery relevant to that count. (App. at B3-6)".

In this statement Southern Bell misinterpreted Sarduy's request for discovery. In the Motion for Continuance (R1-64, par. #6) and Affidavit in Support of Objections (R2-76, par. #2), Sarduy always referred to discovery in general, not on specific counts, and the district court interpreted it likewise (App. at B-4, last paragraph).

4. On P-3, first par., Southern Bell stated "Since there was no factual dispute that Sarduy did not exhaust Pension plan remedies,[2] and no evidence

that it would have been futile for him to pursue that claim and appeal procedure, the district court did not abuse its discretion in dismissing Sarduy's ERISA count".

Since Sarduy's discovery was incomplete, he could not dispute any argument on any count of the motion for summary judgment because he was not yet in possession of the necessary discovery material to successfully argue issues like the availability, exhaust, or adequacy of the Pension plan remedies. Thus, the district court did abuse its discretion in dismissing prematurely the ERISA claim notwithstanding the fact that Sarduy's discovery was incomplete.

5. On P-3, second par., Southern Bell, referring to Sarduy's claim that there were no administrative remedies available to a former employee who,

although vested, had not yet applied for retirement pension, stated: "Sarduy did not, and still has not identified the evidence upon which he relies in making this claim, nor did he bring the existence of this evidence to the attention of the district court. Thus, the only evidence of record during Sarduy's appeal remained that of the Pension plan's administrator".

Sarduy did identify the evidence upon which he relies in making this claim as the Benefit Claim and Appeal Procedure of the BellSouth Management Pension Plan (BSMPP, January 1, 1984 issue, page 32) and reported it during his appeal in the Appellant's Reply Brief, pages 10-11. In addition, Sarduy quoted pertinent part of the BSMPP to rebut Southern Bell's assertion that said plan included a claim and appeal procedure applicable

to Sarduy's status: terminated, vested, and haven't applied yet for pension benefits. As Sarduy's quote reveal, the plan did not included remedies for his status. However, Sarduy was unable to identify on time the existence of this evidence to the attention of the district court because the ERISA count was prematurely dismissed before Sarduy's discovery was complete and he could file a Response to the Motion for Summary Judgment on that count. Thus, the Pension plan's administrator was not the only evidence of record during Sarduy's appeal; the Benefit Claim and Appeal Procedure of the BSMPP was also evidence of record during Sarduy's appeal.

6. On P-4, first par., Southern Bell stated: "At the time that BST argued its motion, no discovery was outstanding,

and no motions to compel were pending." In this statement, Southern Bell ignored that in Sarduy's Motion for Continuance Supported by Affidavit (R1-64), Sarduy stated under oath that one of the matter pending before the court was discovery (id, par. 6) and the district court concurred (App. at B-4, last par.). Thus, discovery was outstanding. As to any pending motion to compel: in the same Motion for Continuance, Sarduy, still under oath, stated that his attorneys' Motion to Withdraw as Counsel was granted on September 24, 1990 (R1-60). Three days later, on September 27, 1990, Sarduy, still under oath, stated that his attorneys filed a Notice of Withdrawal (R1-61) of Plaintiff's Motion to Compel (R1-49), of which Sarduy was not aware (R1-64, par. 5). Sarduy was perplex as to why the court granted his

attorneys' motion to withdraw while a motion to compel that they had originated was stil pending? Then, when Sarduy received and examined the records of the case that his attorneys returned to him upon their withdrawal, Sarduy noticed that his attorneys' Motion to Withdraw as Counsel was stamped-Received by the Clerk of the Court on September 6, 1990, but never entered in the docket. Said Motion to Withdraw as Counsel also failed to notify the Court that Plaintiff's Motion to Compel was pending. Then, during Sarduy's appeal, Southern Bell made reference to Sarduy's attorneys' Motion to Withdraw as Counsel in its Brief of Appellee (page 33), but failed to mention both, Plaintiff's Motion to Compel and Plaintiff's Notice of Withdrawal of said Motion to Compel. As

of today, Sarduy has not yet found a credible explanation to those events.

7. On P-4, second par., Southern Bell dedicated the entire paragraph to the Pension plan's claim and appeal procedure, and stated: "Administrative appeals under the Pension plan could be pursued by a participant or the participant's representative". None of Sarduy's previous attorneys were at anytime concerned with either exhausting or having failed to exhaust Sarduy's administrative remedies under ERISA. Moreover, on the day Sarduy was terminated, the Southern Bell's Benefits Office provided Sarduy with a personalized written statement explaining how would his benefits rights and responsibilities be affected by termination. Nowhere in the document appears a reference to ERISA or the need

for Sarduy to exhaust administrative remedies through the claim and appeal procedure of the Pension plan.

8. On P-4, last par., Southern Bell, referring to how the district judge adopted the magistrate's report and recommendation without having a transcript of the hearing in the record, stated: "Sarduy advanced this argument in the absence of any evidence that the district court had not read the hearing transcript. Even if it had not, however, the district court had the full benefit of the magistrate judge's report and recommendation which it reviewed..... of the entire record, and the objections filed by Sarduy. (App. at B1)".

Sarduy's argument that the district court had not read the hearing transcript derives from Sarduy's

understanding that the district court rules only on the documents entered in the docket, and the undisputed fact that no transcript of the magistrate's hearing on summary judgment dated January 16, 1991, was entered in the docket (Pet. at 22, par., #2). Moreover, the Magistrate's Report and Recommendation (R2-77) failed to refer to Sarduy's Objection and Appeal pending before the court (R2-72); Sarduy's Affidavit in Support of Objections (R2-76); and Sarduy's verbal objection (ore tenus) that he expressed at the opening of the hearing and should appear in the un-docketed transcript. Thus, the district judge did not have a complete and reliable recount of the January 16, 1991 hearing on summary judgment when he adopted the magistrate's report and recommendation (R2-77).

9. On P-5, first par., Southern Bell stated: "Sarduy made no meaningful attempt at a statistical showing". Sarduy compiled his statical showing, from data provided by the E.E.O.C and Southern Bell that produced the following facts: (1) the percentage of the number of employees at least 40 years old terminated by Southern Bell in Florida during 1986 and 1987 (the year Sarduy was terminated), compared to the total number of employees terminated by Southern Bell in Florida during 1986 and 1987 (R3-162, comp. exhibit 2); and (2) the legal description of all discrimination suits filed against Southern Bell in the U.S. District Court for the Southern District of Florida from 1979 to August 9, 1990. The information was compiled from the court's records and introduced as

Sarduy's Exhibit to the Magistrate Judge's Hearing on Summary Judgment dated October 6, 1992.

10. On P-5, second par., Southern Bell, referring to its reply brief, stated: "In its reply brief, BST chose to narrow the focus of its earlier argument by conceding, for purposes of that brief alone, that Sarduy had stated a prima *facie case* of age discrimination. (R3-169, 4-5)"

Southern Bell misrepresents its original argument in the Motion for Summary Judgment, which states: "Plaintiff has presented no evidence that would serve to create a genuine issue of fact concerning his qualifications to remain in the Servicer/Forecaster title. Plaintiff, therefore, has not stated a prima facie case of age discrimination. (R2-131, pg 36, last par; emph. added)".

With the sole objective in mind of refuting Southern Bell's original argument and not any alternative argument or narrow the focus of same, Sarduy presented in his response brief abundant credible evidence concerning his qualifications, performance, and accomplishments, sufficient to create genuine issues of fact that compelled Southern Bell to concede, with magistrate's concurrence, that Sarduy, had establish a prima facie case of discrimination under the ADEA (App at C11, last par.)

11. In P-5, last par., Southern Bell stated: "..... and that he [Sarduy] was prejudiced by the district court's refusal to allow him to file a surreply brief <u>in which he would have presented evidence of pretext</u>. (R4-189, 6-8)".

Sarduy had no desire to present evidence of pretext in his request, but "to respond to two supplemental affidavits that Southern Bell incorporated in support of its Motion for Summary Judgment. In the affidavits Southern Bell reargued maters previously covered in its initial memorandum of law in violation of Local Rule 10C, which states in part:....." (Pet. at 25, #3)

12. On P-5, bottom (#1), Southern Bell presents the same argument of fallacy #10 above, but from another perspective and source. Although Sarduy does not agree with the new version, he will not re-dispute it.

13. On P-6, top (#2), Southern Bell, referring again to the argument of fallacy #10, states: "Sarduy had ample opportunity to challenge <u>both arguments</u>

in his response brief, as well as during oral argument before the magistrate." In his response brief, Sarduy only challenged, as he stated in his answer to fallacy #10, the original argument sustained by Southern Bell in its Motion for Summary Judgment (R2-131, pg 36, last par.)

14. On P-6, #3, Southern Bell, referring to its reply brief stated that it "neither presented <u>new argument or evidence, nor did it raise arguments beyond those to rebut Sarduy's response</u>. (App. at D22, n. 2)" In its reply brief, Southern Bell presented new evidence, raised new arguments and expanded those originally addressed in the motion for summary judgment. To accomplish that, Southern Bell had the full benefit of two supplemental affidavits that

incorporated to its reply brief, in full violation of Local Rule 10C.

15. In P-6, #4, Southern Bell stated: "Sarduy's motion to file a surreply brief contained no suggestion that he sought to introduce evidence beyond that already submitted. (Id)" Sarduy's Request for Leave of Court to Respond to Defendant's Reply Brief and Supplemental Affidavits (R3-171, #1) was intended to respond to Southern Bell's reply brief and its two supplemental affidavits, and not to introduce evidence beyond that already submitted. However, the supplemental affidavits that Southern Bell incorporated to its reply brief in violation of Local Rule 10C, presented new evidence, raised new arguments, and expanded those originally addressed in the motion for summary judgment.

CONCLUSION

The fallacies in Southern Bell's brief in opposition neither weaken the issues raised by Sarduy in his petition for writ of certiorari nor assist the Court in the exercise of its discretionary jurisdiction. Besides, the failure of Southern Bell to address in its brief in opposition any perceived misstatements of fact or law set forth in Sarduy's petition create the necessary conditions to warrant United States Supreme Court review.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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